IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 550

SOUTHERN PACIFIC TRANSPORT COMPANY,
Petitioner,

versus

GERARD SHANNON,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

HARRY McCALL, JR.
1500 National Bank of Commerce
Building
New Orleans, Louisiana 70112
Counsel for Petitioner

August 13, 1970

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	
1. The decision below violates the Rules of Decision Act, 28 U.S.C., §1652, by not applying the law of Louisiana as enunciated by the courts of that state and by affording a recovery which would not have been available in the courts of that state	6
2. The Court of Appeals' taxation of costs against petitioner effects an arbitrary denial of relief, without due process, from that portion of the judgment of the trial court which was set aside by remittitur	18
Conclusion	23
Appendix A - Opinion of Court of Appeals	24
Appendix B - Notice of Order Denying Petition for Rehearing	26
Appendix C - Notice of Order Taxing Costs	27
Appendix D - Notice of Order Denying Stay of Mandate	28
Appendix E - Notice of Order Denying Interim Stay of Execution	30
Appendix F - Order Granting Stay of Execution	32

CITATIONS

STATUTES: Page

28 U.S. Code, Sec. 1652 ..... 2, 3, 6

CASES:

Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350 (4th Cir. 1941) 16

Anderson v. London Guarantee & Accident Co., 36 So. 2d 741 (La. Ct. App. 1948) 14

Campbell v. Allstate Insurance Co., 112 So. 2d 143 (La. Ct. App. 1959) 14

Cartwright v. Fireman's Insurance Co., 254 La. 330, 223 So. 2d 822 (1969) 12

Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1 (7th Cir. 1949) 21

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 2, 5, 6, 15, 16

Frederic v. United States, 246 F. Supp. 368 (E.D. La. 1965) 13

Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) 7

Jones v. Schellenberger, 225 F. 2d 784 (7th Cir. 1955) 21

Marshall's U.S. Auto Supply, Inc. v. Cashman, 111 F. 2d 140 (10th Cir. 1940) 17

Matter of Walter Peterson, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920) 20

Meredith v. Winter Haven, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943) 7

CITATIONS (Continued)

Page

New Orleans & N.E. R.R. v. McEwen & Murray, 49 La. Ann. 1184, 22 So. 675 (1897) 14

Riche v. Thompson, 6 So. 2d 566 (La. Ct. App. 1941) 14

Roca v. Prats, 80 So. 2d 176 (La. Ct. App. 1955) 14

Rouseo v. Gauche-Connor Co., 8 Orl. App. 216 (La. Ct. App. 1911) 14

Schneider v. United States Steel Corp., 147 F. Supp. 289 (D. Minn. 1957) 16

Towner v. Milligan, 234 So. 2d 500 (La. Ct. App. 1970) 13

United States v. E. J. Riggs Const. Co., 116 F. 2d 768 (7th Cir. 1940) 22

United States v. 3969.59 Acres of Land 56 F. Supp. 831 (D. Idaho 1944) 18

Wilson v. National Casualty Co., 191 So. 574 (La. Ct. App. 1939) 14

Woods v. Interstate Realty Co., 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949) 8, 15

MISCELLANEOUS:

20 Am. Jur. 2d 14, *Costs* §15 20

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

SOUTHERN PACIFIC TRANSPORT COMPANY,
Petitioner,

versus

GERARD SHANNON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Southern Pacific Transport Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 10, 1970.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears as Appendix A hereto. No opinion was rendered by the District Court for the Eastern District of Louisiana, New Orleans Division.

Rehearing, Memorandum with respect to taxation of costs, Order denying Stay of Mandate, Mandate and Order Granting Stay of Execution appear at Appendices B, C, D, E and F, hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 10, 1970. A timely petition for rehearing was denied on July 1, 1970. A motion to stay issuance of the court's mandate pending disposition of this petition for certiorari was denied on July 23, 1970, and a motion for an interim stay of execution of judgment to permit action by this Honorable Court on an application to stay the mandate herein was granted on July 31, 1970. An application to this Honorable Court for Stay of Mandate was denied August 10, 1970. This petition for certiorari was filed within ninety days from the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals has contravened the Rules of Decision Act, 28 U.S.C. § 1652, and the holding of this Honorable Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) by failing and refusing, in an action to recover damages for a tort occurring in the state of Louisiana, to apply the law of that state.

titioner of its property without due process of law in correcting error in the trial judge's instructions to the jury by requiring the plaintiff to file a remittitur but at the same time taxing costs against petitioner in excess of the amount remitted.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in summary fashion.

The petitioner, Southern Pacific Transport Company, operated a fleet of trucks within the states of Texas and Louisiana, including the city of New Orleans. On July 1, 1964, one of its trucks was picking up merchandise at a retail store of which respondent, Gerard Shannon, was the manager, in the city of New Orleans. Following receipt of the merchandise, petitioner's driver was raising the hydraulically operated tail gate from the ground to the bed of the truck and folding it to

a vertical position; as he did so, the hydraulic mechanism failed suddenly and without warning, causing the gate to swing out to its horizontal position and fall to the ground. Respondent chose this particular moment to walk around the back of the truck and the outer edge of the tail gate struck him on his leg, causing the injuries which formed the basis of this action.

Respondent brought this suit to recover damages for his injuries in the United States District Court for the Eastern District of Louisiana, New Orleans Division, jurisdiction being predicated upon diversity of citizenship and the cause of action asserted being created by Article 2315 of the Louisiana Civil Code.

Respondent's sole contention of negligence at the trial was that petitioner should have discovered and corrected the condition which caused the gate to fail in advance of the accident. No evidence was offered in support of this contention nor was any support for it elicited in cross-examination of petitioner's driver and its supervisor of equipment. These witnesses — who were the only witnesses to testify on this issue — testified without contradiction that (1) the defect which caused the accident was latent, (2) this defect could not have been discovered by any reasonable inspection, (3) there was no basis in their individual or petitioner's general experience for anticipating the occurrence of such an accident and (4) periodic, reasonable inspection was in fact made.

At the conclusion of the trial, the jury returned a verdict in respondent's favor for $28,600. Petitioner thereupon moved for a new trial on the ground that it could not be liable as a matter of law because the law of Louisiana as enunciated in decisions of the highest court of that state was indisputably that there is no liability for damage caused by a latent defect not discoverable by reasonable inspection and because the uncontradicted evidence was that respondent's injuries were caused by a latent defect in the lift gate, not discoverable by reasonable inspection, and that petitioner had used reasonable means to keep this device in a safe working condition. A further ground assigned for a new trial was the trial judge's improperly instructing the jury as to respondent's special damages.

Upon denial of its motion, petitioner perfected an appeal to the Court of Appeals for the Fifth Circuit on the ground that the trial judge had abused his discretion in refusing to grant a new trial. Decisions of the highest court of the state of Louisiana were cited to the Court of Appeals as authority for the proposition that, where a plaintiff's damages were caused by a latent defect in a defendant's mechanism, the defendant was relieved of liability for such damages when it was shown that the defect was not discoverable by reasonable inspection and that it used reasonable means to keep the mechanism in a safe working condition.

Notwithstanding this clear authority, the Rules of Decision Act and this Court's mandate in *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

(1938), and subsequent cases, that the accident of suit in federal court should not lead to a different result from that which would have obtained in state court, the Court of Appeals, in a per curiam opinion, affirmed the judgment of the lower court, save as to the element of special damages on which the jury had been erroneously instructed, for which a remittitur was ordered, and taxed all costs against petitioner.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW VIOLATES THE RULES OF DECISION ACT, 28 U.S.C. § 1652, BY NOT APPLYING THE LAW OF LOUISIANA AS ENUNCIATED BY THE COURTS OF THAT STATE AND BY AFFORDING A RECOVERY WHICH WOULD NOT HAVE BEEN AVAILABLE IN THE COURTS OF THAT STATE.

Section 1652 of Title 28 provides that the laws of the several states "shall be regarded as rules of decision" in civil actions in United States courts where applicable. It is, and ever since this Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), has been, a cardinal principle guiding federal courts that they must apply the law of the state as enunciated by its highest courts:

> "... Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State and whether the law of the State shall be declared by its Legislature in a statute or by

its highest court in a decision is not a matter of federal concern. . . ." 82 L. Ed. 1188, 1194.

In *Meredith v. Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943), your Honors pointed out that *Erie* not only did not free the federal courts from the duty of deciding questions of state law in diversity cases, but

> ". . . Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. . . ." 88 L. Ed. 9, 15.

Any lingering doubt which may have existed as to the obligation of federal courts to apply state laws was completely dispelled in *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945):

> ". . . since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.
>
> . . . . .
>
> . . . Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally

the proper distribution of judicial power between State and Federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result. . . ." 89 L. Ed. 2079, 2086.

To the same effect, in *Woods v. Interstate Realty Co.*, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949):

"Angel v. Bullington in its alternative ground followed the view of *Guaranty Trust Co. v. York* ... that for purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State . . .'

. . . . .

The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tomp-

kins was designed to eliminate." 93 L. Ed. 1524 1526-27.

The controlling principle of Louisiana law is that proof of fault, or negligence, is an indispensable prerequisite to recovery in tort suits, such as the instant one. No evidence whatsoever was offered by respondent of negligence on petitioner's part, respondent's sole reliance being on his plea of *res ipsâ loquitur*[1] and the unsupported contention that petitioner should somehow have discovered and corrected the condition which caused the accident. There was no conflict in the testimony of the witnesses, as respondent disclaimed any knowledge of the cause of the occurrence[2] and rested his case upon the testimony of petitioner's driver and his supervisor, whom he called as witnesses under cross-examination;[3] the testimony of these witnesses (and there was no other testimony as to cause) was free of internal contradictions or contradiction between them and furnishes no basis whatsoever for a finding of negligence:

Petitioner's driver testified that the truck was inspected before leaving petitioner's yard,[4] that the lift gate had functioned properly on previous pickups that same day, that it had not worked any differently when he lowered the gate just before the accident than it had previously on that same day[5] and that no such

---

[1]Complaint, Par. VIII, Tr. 3; Amended Complaint, Par. 12, Tr. 7.
[2]Tr. 119-20.
[3]Tr. 129 ff, 150 ff.
[4]Tr. 137-8.
[5]Tr. 148.

accident—the one out of which the suit grew had occurred to him during the fifteen years that he had been driving trucks.[6]

Petitioner's assistant manager of equipment, charged with the supervision and maintenance of its trucks, testified that all of petitioner's trucks were periodically inspected at intervals of 2,000 miles or sixty days, that this inspection included operation of the lift gate and that the last inspection before the accident was toward the end of the preceding May[7] (the accident happened on July 1st).[8] He further testified that he had operated the lift gate several times at the site of the accident in an effort to determine what caused it to fall, but that it had operated normally and that he had had the truck returned to petitioner's yard.[9]

He testified that the lift gate had operated properly for him at the yard on numerous tries, that he had then gone home and left it with one of his mechanics, who called him to say that, after trying for two hours to make the lift gate fall, he had finally succeeded in doing so[10] and that the cause of the accident was a maladjustment of the "adjustment nut".[11] He testified that the positioning of this adjustment nut was expected to be good for the life of the truck, and that consequently the adjustment of this nut had not been

---

[6]Tr. 149.
[7]Tr. 151-3.
[8]Complaint, Par. IV, Tr. 2, Tr. 106.
[9]Tr. 153-4.
[10]Tr. 154-5.
[11]Tr. 155.

inspected prior to the accident on this or any other truck, explaining that there was no recommendation or instruction for its inspection, and that no such inspection had been made on this truck during the nine years that it had been owned and operated by petitioner.[12]

This witness categorically denied that discovery of the defect had been made from the manual and testified that it had been made entirely from observation of its operation, that he had found the adjustment nut to be tight and that its slight maladjustment was not discernible by any sort of examination or, indeed, by any means save actual operation of the gate.[13] He testified without contradiction that there had never previously been any necessity for adjusting this nut on the particular truck or any other truck during the entire sixteen years that he had worked for petitioner.[14]

As appears from this review of the testimony, it was uncontradicted, either internally or by any other testimony, and established that the occurrence or the accident was completely unforeseeable, having been caused by a latent defect, that petitioner had exercised reasonable care in having the truck and lift gate inspected, that petitioner had no prior notice of the defective condition or opportunity therefor and that the defect could not reasonably have been discovered

---

[12]Tr. 155-7, 159.
[13]Tr. 158, 162-3.
[14]Tr. 161-2.

by a proper inspection. The law of Louisiana is clear that, in such a situation, there is no liability.

The most recent and directly controlling Louisiana decision is *Cartwright v. Fireman's Insurance Co.*, 254 La. 330, 223 So. 2d 822 (1969), in which the highest court of that state denied recovery for property damage to an automobile which was struck in the rear by defendant's assured while stopped in obedience to a traffic signal. The evidence showed that the defendant's assured had applied his brakes before the accident but that, by reason of a sudden rupture of the left front brake line of his automobile, releasing all the fluid from the brake system, his brakes were inoperative. The court determined from the evidence that prior detection of a latent defect in the brake line was very difficult, that the defendant's assured had had his automobile inspected periodically and that he had no advance notice of the latent weakness of the brake line, nor could reasonable observation have given him any.

The court stated the issue to be whether an automobile owner was strictly and absolutely responsible for damages caused by a defect in his vehicle, irrespective of whether he had any reasonable means of discovering such defect and his use of every precaution to maintain it in a safe condition. Its answer to the question was unequivocally in the negative:

> ". . . proof that plaintiff's damages were caused by a latent defect in defendant's automobile relieved him of liability for the dam-

ages when it was shown that he used reasonable means to keep his vehicle in a safe working condition.

.....

[1] There is little doubt that in this jurisdiction, in suits sounding in tort, there can be no recovery without fault except in those instances where strict liability is provided by legislative action. . . ." 223 So.2d 822, 823-24.

The rule enunciated by the Supreme Court of Louisiana was reiterated by the Court of Appeal for the Third Circuit of that state in a subsequent brake failure case, *Towner v. Milligan*, 234 So. 2d 500. (La. Ct. App. 1970):

"[1] The applicable rule of law is that a driver generally is not held to be responsible for latent defects in his car where he exercises reasonable care in having the car inspected and he has had no reasonable prior notice of a defective condition. . . . The evidence must establish that the driver was not aware of the defects, and that the defects could not reasonably have been discovered by a proper inspection. . . ." 234 So. 2d 500, 502.

This rule that foreseeability of harm is an indispensable prerequisite to a finding of negligence has been consistently followed by the courts of Louisiana and by federal courts sitting within the state of Louisiana. In *Frederic v. United States*, 246 F. Supp. 368 (E.D.

La. 1965), recovery was denied the widow of a Veterans Administration Hospital patient who had committed suicide by jumping out of a window where there was no evidence to show that the decedent needed psychiatric treatment or any indication that he should have been more securely confined. In *Roca v. Prats*, 80 So. 2d 176 (La. Ct. App. 1955), where the plaintiff had fallen through the floor opening from which defendant's repairman removed a floor furnace grill for repairs, the court held that, under the circumstances, the occurrence of the accident could not reasonably have been foreseen and recovery was accordingly denied. In *Rouseo v. Gauche-Connor Co.*, 8 Orl. App. 216, (La. Ct. App. 1911), recovery was denied for the death of plaintiff's horse when defendant's horse, frightened by an approaching elephant, broke free and ran away, penetrating the chest of plaintiff's horse with the shaft of its wagon; finding that the appearance of the elephant was an extraordinary circumstance which could not have been foreseen, the court rejected plaintiff's demands. *Campbell v. Allstate Insurance Co.*, 112 So. 2d 143 (La. Ct. App. 1959), is an application of this same rule to injuries sustained by the plaintiff when the pull rope of a mechanical lawnmower slipped without warning.

Other Louisiana cases holding foreseeability to be an indispensable element of liability are *New Orleans & N.E. R.R. v. McEwen & Murray*, 22 So. 675, 49 La. Ann. 1184 (1897); *Wilson v. National Casualty Co.*, 191 So. 574 (La. Ct. App. 1939); *Riche v. Thompson*, 6 So. 2d 566 (La. Ct. App. 1941); and *Anderson v. London Guarantee & Accident Co.*, 36 So. 2d 741 (La. Ct. App.

1948). This is not a case in which the jury drew its conclusion from conflicting testimony, as there was no conflict whatsoever in the testimony; there was simply no evidence on which to base a finding of the indispensable element of negligence required by the law of Louisiana.

It is clear from a consideration of the above cited decisions of the courts of Louisiana that plaintiff has obtained, and the Court of Appeals has affirmed, a judgment which he would not have been able to obtain or which, if obtained, would have been set aside in state court. This court has explicitly pointed out that such a result was precisely what its holding in *Erie R.R. v. Tompkins* was to prevent and that no discrimination can be tolerated in favor of litigants who are able to invoke diversity jurisdiction:

> "... The York case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the State court, he should likewise be barred in federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity juridsiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate." *Woods v. Interstate Realty Company*, 337 U.S.

535, 538, 69 S. Ct. 1235, 93 L. Ed. 1524, 1527 (1949).

If the judgment of the Court of Appeals is permitted to stand, petitioner will be required to satisfy a judgment for damages resulting from a tort occurring within the state of Louisiana which could not have been obtained in the courts of that state. The Court of Appeals' summary rejection of petitioner's appeal without discussion thereof is directly in conflict and irreconcilable with the Rules of Decision Act as construed in *Erie R.R. v. Tompkins* and subsequent cases.

The trial court had not only the power but the duty under Rule 59(a) of the Federal Rules of Civil Procedure to grant petitioner's motion for a new trial:

> "... On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, ..." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350, 352 (4 Cir. 1941).

> "[1, 2] Insofar as the motion for a new trial is concerned, it is clear that under Fed. Rules Civ. Proc. rule 59, 28 U.S.C., a trial court is vested with ample power to grant a new trial in order to see that justice is done. . . ." *Schneider v. United States Steel Corp.*, 147 F. Supp. 289, (D. Minn. 1957).

While the motion is addressed to the discretion of the trial court, its action on the motion may be assigned as error on appeal:

> "[1-4] The action of the court in setting aside the first verdict and judgment and granting a new trial is challenged for abuse of discretion. It is an inveterate rule of wide recognition that a motion for new trial is addressed to the sound judicial discretion of the trial court, and ordinarily an appellate court will not review the action thereon for error of fact.... But on appeal from a final judgment subsequently entered the ruling may be assigned as error on the ground that the court abused its discretion...." *Marshall's U.S. Auto Supply v. Cashman*, 111 F. 2d 140, 141, (10th Cir. 1940).
>
> [6-9] It is also a well-settled rule that the granting or denying of a motion for new trial in Federal Court rests in the discretion of the Trial Court but this settled rule of law is like many other rules of law where we find exceptions to the rule, and if a plain injustice has been suffered by either party to the action and there is no competent evidence to support the finding of the jury, then the overruling of a motion for new trial is termed an abuse of discretion and although the Trial court possesses a discretion it must be exercised wisely and if it clearly appears that it has been exercised unwisely, and to have been plainly abused then it is reviewable upon appeal. If there is a legal

ground that requires the Court, in the interest of justice, to grant a new trial then there is no basis for the Court to act arbitrarily.

> . . . if the verdict is not supported by the evidence then it is the duty of this Court to set aside the verdict and to grant a new trial in the exercise of sound discretion." *United States v. 3969.59 Acres of Land*, 56 F. Supp. 831, 835 (D. Idaho 1944).

This application for writs presents a situation in which there has been a flagrant disregard of the Rules of Decision Act requiring that the law of the state be applied, an abuse of the trial court's discretion in denying petitioner's motion for a new trial and a refusal on the part of the Court of Appeals to rectify this error by affirming the judgment against petitioner in a per curiam opinion reciting the palpably erroneous conclusion that petitioner's allegation of error in this respect is "without merit".

2. THE COURT OF APPEALS' TAXATION OF COSTS AGAINST PETITIONER EFFECTS AN ARBITRARY DENIAL OF RELIEF, WITHOUT DUE PROCESS, FROM THAT PORTION OF THE JUDGMENT OF THE TRIAL COURT WHICH WAS SET ASIDE BY REMITTITUR.

When, following denial of petitioner's motion for a new trial, judgment was entered by the trial court, petitioner believed that this judgment was erroneous on at least two counts, viz. first and foremost, a new

trial should have been granted on the issue of liability for the reasons set forth in the foregoing section of this application, and, second and incidentally, the jury was improperly instructed that the $860.00 received by plaintiff as compensation benefits constituted special damages, thereby confusing and misleading the jury and producing a judgment excessive at least to that extent.

Both errors were assigned as grounds for reversal; the Court of Appeals rejected the first and upheld the second, but avoided remand by ordering a remittitur in this amount.[15] The Court of Appeals then taxed all costs of the appeal, amounting to Eight Hundred Seventy-One and 37/100 Dollars ($871.37) for petitioner and Seventy-One and 03/100 ($71.03) for respondent, against petitioner.

Thus, although the Court of Appeals recognized and corrected the trial court's error in instructing the jury, from which petitioner took an appeal, the saving to petitioner was more than offset by petitioner's inability to recover its costs incurred in taking its appeal and by being required to reimburse respondent his costs. Petitioner's appeal was successful to this extent, but its inability to recover costs has effectively denied it

---

[15] In doing so, the court begged the question whether the judgment was excessive in precisely this amount or in some other or greater amount, petitioner having argued on appeal that, since it could only be surmised, but not be known, what verdict the jury would have returned if it had been properly instructed, this erroneous instruction invalidated the entire award.

relief from the unquestionably erroneous instruction and judgment of the trial court.[16]

While Rule 39 of the Federal Rules of Appellate Procedure leaves the award of costs to the discretion of the Court of Appeals, it is at least implicit in this rule that this discretion will be exercised in a reasonable and equitable fashion. Normally costs are awarded to the prevailing party; Rule 54(d) of the Federal Rules of Civil Procedure so provides at the District Court level and this was the general rule before adoption of the Federal Rules of Appellate Procedure:

> "While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right . . . except in those few cases where by express statutory provision or by established principles, costs are denied. . . ." *Matter of Walter Peterson*, 253 U.S. 300, 40 S. Ct. 543, 64 L. ed. 919, 927 (1920).

Costs are normally awarded to the prevailing party even though he is accorded only part of the relief demanded (*See* 20 Am. Jur. 2d 14, *Costs* §15) and failure to do so is usually by way of penalizing the prevailing

---

[16] If petitioner was prejudiced by an erroneous instruction (as it undoubtedly was and as the Court of Appeals recognized), it was the obligation and duty of the Court of Appeals to correct this error, but not to assess costs against petitioner so as to take away the benefit of the correction.

party, as in *Jones v. Schellenberger*, 225 F. 2d 784, 794 (7th Cir. 1955), where the conduct of the prevailing party was characterized as "reprehensible", or where his conduct has unnecessarily burdened the court:

> "... As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. (Citing authorities). A party although prevailing would be denied costs for needlessly bringing or prolonging litigation." *Chicago Sugar Co. v. American Sugar Refining Co.* 176 F. 2d 1, 11 (7th Cir. 1949).

There is no suggestion of any such conduct on the part of petitioner herein.[17] If the rule were that costs would be assessed against petitioner in any event, clearly the value of an appeal on this aspect of the judgment would be destroyed; either petitioner accepted and paid the erroneous judgment or paid costs in excess of the amount thereof in an effort to have this error corrected.

---

[17] During oral argument before the Court of Appeals, the chief judge implied that the monetary consequences of the erroneous instruction were so small that mention of this point on appeal constituted an imposition upon the court's time, but that this attitude could have motivated the court's decision with respect to costs is difficult to credit.

In *United States v. E. J. Riggs Const. Co.*, 116 F. 2d 768 (7th Cir. 1940), the Court of Appeals divided the costs between the parties notwithstanding the fact that the plaintiff had recovered most of the amount sued for, on the ground that the defendant's settlement offer had been for almost the amount awarded and that the complicated nature of the claim made it quite apparent that the trial would be long and expensive:

> "....The offer as made by defendants indicates an earnest effort to compromise and avoid litigation. Of course, the plaintiff had a right to refuse the offer and to litigate to its heart's content. In doing so, however, we think it is fair and just that it sustain at least a part of the burden of the litigation instituted and carried on under such circumstances...." 116 F. 2d 768, 775.

In the instant case respondent had ample opportunity to correct the error which was ultimately rectified by the Court of Appeals: He could have done so when petitioner filed its motion for a new trial, he could have done so when petitioner took its appeal and he could have done so before, during or immediately after oral argument. As the Seventh Circuit said in *Riggs*, he had a right to refuse to do so and to litigate to his heart's content, but, having elected to do so, he should bear at least part of the burden of the costs of the appeal.

For all of these reasons, it is submitted that there was a clear abuse of its discretion by the Court of

Appeals with respect to assessment of costs, that this abuse of discretion has arbitrarily deprived petitioner of its property without due process and a writ should issue herein to correct this abuse.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

SIGNED: HARRY McCALL, JR.

Harry McCall, Jr.
1500 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Petitioner

August 13, 1970

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28691

GERARD SHANNON,
Plaintiff-Appellee,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 10, 1970)

Before BROWN, Chief Judge, and GEWIN and THORNBERRY, Circuit Judges.

PER CURIAM: Southern Pacific Transport Company appeals from an adverse judgment in this diversity action brought by Gerard Shannon. Shannon was injured when the hydraulically operated lift gate on a Southern Pacific truck malfunctioned and fell on his leg. The jury returned a verdict for Shannon in the amount of $28,600. Southern Pacific contends: (1)

The Court erroneously instructed the jury as to the amount of Shannon's special damages; (2) the jury's finding of negligence was without evidentiary support, (3) Shannon was guilty of contributory negligence as a matter of law, and (4) the verdict of the jury is excessive.

Southern Pacific argues that the court, in charging the jury on Shannon's special damages, erroneously included $860 in compensation benefits which Shannon had received from his employer. Shannon does not deny that the compensation benefits were improperly included in the charge but urges that the error was attributable to assertions by trial counsel for Southern Pacific and to counsel's failure to correct the consequent misapprehension of the trial court as to the amount of special damages. We find no merit in this position, inasmuch as a timely objection was taken on this very point.

However, we are convinced that the remaining allegations of error are without merit and that the error we have found need not occasion a new trial. If Shannon will file a remittitur in the amount of $860 in this court within 15 days from the date of this opinion, the judgment of the court below will be affirmed in the amount of $27,740.[1] Otherwise the judgment will be reversed and the cause remanded for a new trial.

---

[1] 6A J. Moore, Federal Practice ¶59.05[3], at 3749 (2d ed. 1966); J.F. Pritchard & Co. v. R.A. Stokes Co., 160 F.2d 739, 741 (5th Cir. 1947).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130
(504) 527-6514

July 1, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28691 — Shannon vs.
Southern Pacific Transport
Company

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and Stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) PAT QUARTARARO
Deputy Clerk

/paq
cc: Mr. Harry McCall, Jr.
Mr. James T. Flanagan

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130

July 1, 1970

MEMORANDUM TO COUNSEL LISTED BELOW

No. 28691 — Shannon v. Southern Pacific Transport Co.

Gentlemen:

This is to advise that the Court has ordered costs in the referenced cause taxed as follows:

Against the defendant-appellant,
Southern Pacific Transport Co.

Therefore, you are requested to complete and return for filing the Bill of Costs forwarded herewith by July 15, 1970

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) FRANCES WOLFF
Deputy Clerk

enc.
Mr. Harry McCall, Jr.
Mr. James T. Flanagan

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130
Tel. No. 527-6514

July 23, 1970

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW

Re: No. 28691 — Gerald Shannon
vs. Southern Pacific
Transport Company.

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.
( ) Motion to supplement or correct record granted.
( ) Motion of ( ) for leave to file supplemental brief granted.
( ) Stipulation as to time for filing briefs has been granted.
( ) Motion for leave to file brief in excess of pages under Rule 28(g) F.R.A.P. granted.

( ) The Court's opinion has this day been rendered and a copy thereof is enclosed.

( ) Motion for leave to file petition for rehearing in excess of pages under Rule 40(b) F.R.A.P. granted.

( ) A stay of mandate has been granted to and including

(X) Order enclosed has been entered.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) ROSALIE AUMENT
Deputy Clerk

/cms
cc: Mr. Harry McCall, Jr.
Mr. James T. Flanagan

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28691

GERALD SHANNON,
Plaintiff-Appellee,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ORDER: —

ON CONSIDERATION of the motion of appellant for stay of the issuance of mandate in the above entitled and numbered cause, and of the opposition of appellee thereto,

IT IS ORDERED that said motion be, and it is hereby DENIED.

(Signed) WALTER P. GEWIN
U. S. CIRCUIT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130

July 24, 1970

Clerk
United States District Court
New Orleans, La.

L 31

Re: No. 28691 — Gerald Shannon vs.
Southern Pacific Transport Company.
D. C. No. CA 15535 "A"

Dear Sir:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judment of this Court in the above case, issued as and for the mandate.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.
(X) Original record on appeal. (And supplemental record)
( ) Original exhibits. (To be returned later)
(X) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) ROSALIE AUMENT
Deputy Clerk

enc.
cc: (Bill of costs only)
Mr. Harry McCall, Jr.
Mr. James T. Flanagan
Mr. R. Henry Sarpy, Jr.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28691

GERARD SHANNON,
Plaintiff-Appellee,
versus

SOUTHERN PACIFIC TRANSPORT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Filed: Jul. 31, 1970

ORDER:

IT IS ORDERED that the motion of appellant for a stay of the execution of the judgment of this court issued on July 24, 1970 for a period of 14 days from that date pending the filing of an application with the Supreme Court of the United States for an order staying the execution of the mandate pending final disposition of a petition for a writ of certiorari in this cause be and the same is hereby granted.

/s/ WALTER P. GEWIN
UNITED STATES CIRCUIT
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of August, 1970, three copies of the petition for writ of certiorari have been ~~mailed, postage prepaid~~ delivered to James T. Flanagan, 303 Cotton Exchange Building, New Orleans, Louisiana, counsel for respondent and to R. Henry Sarpy, 28th floor, 225 Baronne St., New Orleans, La., counsel for intervenor. I further certify that all parties required to be served have been served.

SIGNED: HARRY McCALL, JR.

Harry McCall, Jr.
1500 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Petitioner